Supreme Court, U. S.
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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 9, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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In the
United States Court of Appeals
For the Eighth Circuit

No. 74-1614

Union Electric Company,
Petitioner,
v.
Environmental Protection Agency,
Respondent.

RELEVANT DOCKET ENTRIES

1974

August 19. Petition of Union Electric Company for review of a part of the Missouri Air Pollution Control Implementation Plan filed.

September 9. Court orders briefs on its subject matter jurisdiction.

September 12. Motion of State of Missouri and Missouri Air Conservation Commission to intervene filed.

September 30. Court enters order sustaining the motion to intervene.

October 31. Motion to dismiss filed by Intervenor-Respondents.

November 14. Motion to dismiss filed by Respondent.

December 2. Petitioner files a motion to amend its petition.

December 31. Court enters order sustaining motion to amend petition.

1975

January 10. Case argued and submitted before Judges Gibson, Heaney & Ross.

March 27. Opinion by Judge Gibson and judgment of Court dismissing petition filed. (opinion printed on pages A-1 through A-26 and judgment printed on page A-27 of Appendices to Petition for Certiorari)

In the
United States Court of Appeals
For the Eighth Circuit

(Title omitted in printing)

PETITION
For the Review of a Part of the Missouri Air Pollution Control Implementation Plan
(Filed August 19, 1974)
General Allegations

1. This is a petition for review of the provisions of Section B, Regulation X of the Air Quality Standards and Air Pollution Control Regulations of the St. Louis Metropolitan Area and other provisions of the Missouri law and St. Louis County ordinances relating thereto, both as those provisions fall within the jurisdiction of the Missouri Air Conservation Commission for the Missouri Counties of Franklin, St. Charles and Jefferson and within the jurisdiction of the Department of Community Health and Medical Care, Air Pollution Control Branch, of St. Louis County, Missouri.

2. Regulation X applies to the "Restriction of Emissions of Sulphur Dioxide from Use of Fuel" and Section B thereof applies to "Restriction Applicable to Fuel Burning Installations with a Capacity of 2,000 Million or More British Thermal Units Per Hour."

3. Section B of Regulation X, along with other provisions of said Missouri Air Pollution Control Regulations, were approved as a state implementation plan by the Administrator of the Respondent Environmental Protection Agency on May 31, 1972. 37 Fed. Reg. No. 105, Part 3. Such approval was effected pursuant to Section 110 of the Federal Clean Air Act as amended. 42 USC Sec. 1857c-5.

Parties

4. The Petitioner Union Electric Company is a Missouri corporation with its principal and registered office at 1901 Gratiot Street, St. Louis, Missouri 63103. It now is, and for many years has been, engaged in the business, among others, of generating, transmitting, distributing and selling electrical power and energy in central and eastern Missouri (including the St. Louis Metropolitan Area), western Illinois and southeastern Iowa. It is a public utility subject to the jurisdiction of the Missouri Public Service Commission, the Illinois Commerce Commssion, the Iowa State Commerce Commission and the Federal Power Commission. It and its utility subsidiaries (which obtain the bulk of their electricity from it) serve approximately 848,000 customers in an area of 19,200 square miles with an estimated population of 2,500,000.

5. Petitioner owns and operates coal fired generating plants in the Missouri Counties of Franklin (the Labadie Plant), St. Charles (the Sioux Plant) and St. Louis (the Meramec Plant). Those three plants produce about 87% of Petitioner's kilowatt hour output.

6. Respondent Environmental Protection Agency is an agency of the United States of America with its principal office at 401 M Street, S.W., Washington, D.C. 20460. Region VII of such Agency, wherein Petitioner is located, has its offices at 1735 Baltimore, Kansas City, Missouri 64108. The Administrator of the Agency is Russell E. Train and the Regional Administrator for Region VII is Jerome H. Svore. The Agency and particularly its Administrator are charged with the enforcement of the Clean Air Act as amended. (42 USC Sec. 1857 et seq.).

Jurisdiction

7. This petition is filed in this Court pursuant to the provisions of subparagraph (b)(1) of Section 307 of the Clean Air Act as amended. 42 USC Sec. 1857h-5(b)(1). The pertinent part of that subparagraph says that:

> "A petition for review of the administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval or after such date if such petition is based solely on grounds arising after such 30th day."

8. Since a part of the Missouri implementation plan is being subjected to review in this case and since all of petitioner's generating plants previously referred to and its principal and registered offices are located in Missouri, the 8th Circuit, which includes Missouri, is the "appropriate circuit".

9. As we hereafter allege more fully, this petition is based solely on grounds arising after June 30, 1972, which was the 30th day following the Administrator's approval of the Missouri implementation plan.

Status of Variance Requests and Notice of Violation

10. The Missouri Air Conservation Law, which applies to the Labadie and Sioux Plants, includes a provision for the granting of variances (Sec. 203.110, R.S.Mo. 1969); and the St. Louis County Air Pollution Code, which applies to the Meramec Plant, also includes a provision for granting variances (Sec. 612.080 of St. Louis County Code).

11. These provisions constitute a part of the Missouri Implementation Plan which was approved by Respondent's Administrator on May 31, 1972 (37 Fed. Reg. No. 105, Part 3).

12. The Air Pollution Control Director of St. Louis County recommended that a variance for the Meramec Plant from the requirements of Section B, Regulation X, be denied and Petitioner has appealed that denial to the St. Louis County Air Pollution Control Appeal Board.

13. A variance from Section B for the Sioux Plant, which was granted by the Missouri Air Conservation Commission, expired on July 24, 1974. However, Petitioner has requested that said variance be extended.

14. Petitioner has requested a variance from Section B for its Labadie Plant. However, the Missouri Air Conservation Commission to which the request was made has not acted on it.

15. By letter dated May 31, 1974, the Respondent notified Petitioner that sulfur dioxide emissions from the Labadie, Sioux and Meramec Plants violated the requirements of Section B, which section constitutes a part of the "federally-approved implementation plan applicable to the air quality control region in which the Labadie, Meramec and Sioux Power Plants are located".

Results of (a) Failure to Comply and (b) Compliance by Closing Plants

16. Petitioner could comply with the notice of violation by shutting down its Labadie, Sioux and Meramec Plants. However, as we previously alleged, those plants supply the major part of Petitioner's electric load. Since it would be impossible to supply electrical service to Petitioner's customers for any

length of time (or under some circumstances even for a second) from other sources, there would soon be a discontinuance of electric service to large numbers of persons in the middle west. This would result in an immediate cessation of civilized life as we know it in that part of the country. And this would, of course, be a national catastrophe.

17. Section 113(c) of the Clean Air Act as amended (42 USC Sec. 1857c-8(c)) provides for a fine of not more than $25,000 per day of violation and, after the first conviction, a fine of not more than $50,000 per day. The Act is not clear as to whether the fine should be imposed on a per plant or per company basis. In any event it is obvious that the fine could run into large sums.

18. We believe and allege that the financial burden of such a fine would be so great that it would be impossible for Petitioner to continue obtaining (through short term loans or long term financings) the funds necessary for it to remain solvent and continue in business.

19. Petitioner's First Mortgage and Deed of Trust under which $773,000,000 in principal amount of its bonds are now outstanding states that failure of Petitioner to comply with valid governmental orders (such as a valid order of Respondent's administrator concerning emissions from its power plants) may become an event of default and make all such bonds callable. It is obvious that calling all such bonds would result in immediate bankruptcy of Petitioner.

Grounds Arising Since June 30, 1972, Demonstrate That Compliance by Petitioner Is Impossible or, in the Alternative, Manifestly Against the Public Interest

20. The only way it could be contended that Petitioner might be able to comply with the Sulfur Dioxide emission requirement of Section B is by burning low sulfur coal or by the installation of sulfur dioxide removal equipment at its plants. Additionally, there is serious doubt whether low sulfur coal can be utilized at the Sioux plant.

21. The Arabian Oil Embargo and related economic factors, which occurred after June 30, 1972, have resulted in such a shortage of, and a high price for, low sulfur coal that it is impossible for Petitioner to obtain it in sufficient quantities to comply with said Section B; or, in the alternative, the cost of such fuel (and the resulting price of electricity) would be so high, if the fuel could be obtained, that it would be manifestly against the public interest to purchase it.

22. Since June 30, 1972, it has been demonstrated that sulfur dioxide removal equipment, which would enable Petitioner to comply with Section B, has not been developed or invented.

23. Since June 30, 1972, the price of the sulfur dioxide removal equipment, even in its present unproven state of development, has increased so much that its installation at Petitioner's Labadie, Sioux and Meramec Plants would cost more than $500,000,000.

24. Due to the unreliability and high price of sulfur dioxide removal equipment, we allege and believe that the Commissions regulating Petitioner would not approve as a prudent investment the financing necessary to obtain funds required to install it. We further allege and believe that if the Commissions were to permit such financing, the factors enumerated above, as well as other economic factors occurring since June 30, 1972, would make it impossible to sell such securities. Alternatively, we allege and believe, due to economic and other factors occurring since June 30, 1972, that the carrying, operating and maintenance cost of sulfur dioxide

removal equipment, if installed, would be more than $120,-000,000 per annum, and we allege and believe that the resulting increase in the price of electricity would be manifestly against the public interest.

25. We believe and allege that research and reports made known since June 30, 1972, disclose that Sulfur Dioxide in the ambient air does not constitute the medical hazard that it was once thought to constitute and that this should now be fully considered in a proceeding questioning the legality of the Section B Sulfur Dioxide emission regulations.

26. We believe and allege that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary ambient air quality standards promulgated by Respondent's Administrator for the St. Louis Metropolitan Area. We further allege and believe that this factor, along with the other factors we have mentioned above, should be considered in determining whether any further "attempt" should be made to achieve a compliance with Section B.

Wherefore, Petitioner prays:

1. That this Court take jurisdiction and determine first whether the matters alleged herein should be considered and decided by it in a proceeding under Section 307(b)(1) of the Clean Air Act as amended (42 USC Sec. 1857h-5(b)(1)).

2. That in the event this Court determines that it should hear and decide such matters, it appoint a Master to take evidence and on the basis of the evidence so taken, that it find and determine that Section B of Regulation X is void and of no effect as applied to Petitioner's Labadie, Sioux and Meramec Plants, and

3. That this Court grant such other and further relief as it may deem proper in the premises.

KEEFE, SCHLAFLY, GRIESEDIECK & FERRELL

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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

COURT ORDER OF SEPTEMBER 9, 1974
Directing Briefs on Its Subject Matter Jurisdiction

This petition is ordered filed for the purpose of considering whether this court has subject matter jurisdiction.

The petitioner is to submit a brief in support of our jurisdiction within ten days from the date of this order. The brief may

be in typewritten form, on letter-size paper, fastened in the left margin. The brief is not to exceed thirty typewritten pages. An original and three copies are to be filed with the clerk of this court and additional copies served on counsel for respondent.

The respondent is directed to file a similar typewritten response to petitioner's brief within ten days of such filing with the respondent's brief also directed to our subject matter jurisdiction.

The parties are requested, assuming *arguendo* that we have jurisdiction, to advise the court of their suggestions as to the procedures to be followed in securing a resolution on the merits.

In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

INTERVENOR-RESPONDENTS MOTION TO DISMISS

(Filed September 12, 1974)

Come now intervenor-respondents, John C. Danforth, Attorney General of Missouri, and the Missouri Air Conservation Commission, and move the court to dismiss the above case for the following reasons:

1. The petition fails to state a claim upon which relief can be granted. The standard of review applicable to this case is whether the action of the agency (EPA) in approving the Missouri implementation plan was "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law." *Delaware Citizens for Clean Air, Inc. v. EPA*, 480 F.2d 972 (3d Cir. 1973); *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875 (1st Cir. 1973). The ultimate standard is whether the agency has committed a "clear error of judgment". *Delaware Citizens for Clean Air, Inc. v. EPA, supra; Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). Petitioner has failed to allege any act on the part of EPA constituting a violation of the above standards, and has thus failed to state a claim upon which relief can be granted.

2. Primary jurisdiction over the issues raised by the petition lies in the MACC. See Brief on Jurisdiction, pp. 5-10, filed by intervenor-respondents herewith.

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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

RESPONDENT'S MOTION TO DISMISS

(Filed November 14, 1974)

Respondent, Environmental Protection Agency, moves this Court, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule 9 of the Rules for the United States Court of Appeals for the Eighth Circuit, to dismiss the Petition for Review filed by Union Electric Company on the ground that this Court lacks jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. Sec. 1857h-5(b)(1).

Respectfully submitted

by s/ THOMAS A. PURSLEY, III
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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

MOTION OF PETITIONER UNION ELECTRIC COMPANY FOR LEAVE TO AMEND PETITION

(Filed December 2, 1974)

Petitioner Union Electric Company moves this Court for leave to amend its petition in the following two respects:

1. By deleting therefrom in its entirety the following sentence, which is the last sentence in paragraph 20 on page 5:

> "Additionally there is serious doubt whether low sulfur coal can be utilized at the Sioux Plant;" and

2. By deleting therefrom the first sentence in paragraph 26 on page 7, which says:

> "We believe and allege that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary ambient air quality standards promulgated by Respondent's Administrator for the St. Louis Metropolitan Area;"

and substituting in its place the following sentence:

> "We believe and allege that information made known since June 30, 1972 discloses that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary or secondary ambient air quality standards promulgated by Respondent's Adminis-

trator for the St. Louis Metropolitan Area and that the margin of such fulfillment has been increasing."

With reference to the first requested amendment, Petitioner states that the sentence to be deleted is cryptic, perhaps irrelevant and subject to some evidentiary doubts.

With reference to the second requested amendment, Petitioner suggests that the time element stated therein is relevant and that it is appropriate and correct to include therein the averments concerning the secondary standard and the increasing margin by which both standards are being fulfilled.

Respectfully submitted

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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

COURT ORDER OF DECEMBER 31, 1974 SUSTAINING MOTION TO AMEND PETITION

Petitioner's motion for leave to amend petition is granted.

Note: The opinion of the United States Court of Appeals, Eighth Circuit, is printed on pages A-1 through A-26 of Appendix A to the Petition for Certiorari and the judgment of the Court is printed in Appendix B, page A-27, of such Petition.